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SUBJECT: Designation of Legal Counsel for Purposes of Closed Session

TO ALL INTERESTED PERSONS:

Pursuant to Iowa Code section 23.6 and rule 497—1.2(2), the Iowa Public Information Board issues this opinion on a governmental body designating its legal counsel for purposes of a closed session. We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION:

What is required for a governmental body to designate who its legal counsel is for purposes of closed session?

OPINION:

Iowa Code section 21.5(1)(c) permits a governmental body to go into closed session to “discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent....” The Iowa Court of Appeals has opined that for a governmental body to go into closed session for purposes of Iowa Code section 21.5(1)(c), that the attorney for the governmental body be present. By administrative rule, we have adopted the holding of that opinion and have stated that “present” means either “in person or by electronic means.”¹

The issue has been raised in two recent complaints concerning governmental bodies going into closed session and it was not clear who the attorneys were for the governmental bodies. We are of the opinion that for purposes of going into closed session under Iowa Code section 21.5(1)(c), there needs to exist a prior public statement of the attorney-client relationship between the governmental body and the individual who is going to be its legal counsel. This statement can be an existing engagement letter, contract, resolution, or a designation made in the minutes of a prior meeting. If there has been no prior public statement, then the governmental body should announce before going into closed session that it is going to utilize the individual as its legal counsel on the issue that is going to be discussed in closed session. If the governmental body is going to utilize an individual as its attorney and the name of that individual has already been publicly stated, then no additional announcement or designation is required.²

¹ This rule was adopted on November 19, 2015, and will be effective January 27, 2016, as 497—8.2(21,23).

² However, to do so would be considered a “best practice.”

Board Members

Robert Andeweg • Anthony Gaughan • Jo Martin • Andrew McKean • Gary Mohr • William Monroe
Kathleen Richardson • Suzan Stewart • Peggy Weiltl

In closing, this opinion applies solely to the application of Iowa Code chapter 21 and does not speak to the application of the Iowa Rules of Professional Conduct for attorneys or to any interpretations of those rules by the Iowa Supreme Court.

BY DIRECTION AND VOTE OF THE BOARD

Suzan Stewart, Chair
Kathleen Richardson, Vice Chair
Robert Andeweg
Anthony Gaughan
Jo Martin
Andrew McKean
Gary Mohr
William Monroe
Peggy Weitzl

Submitted by: W. Charles Smithson, IPIB Director